

## **CONTROL OVER THE HUMAN BODY BEFORE AND AFTER DEATH: THE CIVIL LAW ASPECT**

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*In this article, an attempt is made to determine the legal status of the human body (organs and tissue) both while a person is alive and after a person dies. The article discusses the points of view of various authors in relation to the possibility of considering the human body, its organs and tissue, after their separation from the body, as objects of a person's property rights, and also as an object of a person's non-property rights. The article argues the impossibility of qualifying the human body and the organs that were not separated from it during life as parts – and perhaps critical parts – of the existence of the total human being, as objects of real (property) rights including the rights of the persons themselves. The human body as a single object is a personal non-property benefit. The organs and tissue separated from the body may be considered objects of real rights, but on several conditions: if they were indeed separated from the body and if the person gave permission for this in a will. The specific characteristics of the legal status of the separated organs and tissue of a human being are analyzed as things (possessions) with limited turnover. The specific characteristics of the legal status of the organs and tissue separated from the body as possessions in limited turnover are reviewed as well as the impact of personal non-property rights on this status. The main focus of the article is on the legal status of the human body and the organs separated from it after death in view of the fact that transplantology and postmortem organ donation are becoming more and more widespread. This issue is analyzed in terms of the body as a whole and as it applies to the organs and tissue that are not used for transplantation. The proposal is to base our analysis on the status of the human body after death which as a rule cannot be the object of property rights. The human body is disposed of within the framework of the protection of the personal non-property rights of the deceased, including the right of physical inviolability that covers the organs and tissue separated from the body. The article characterizes the legal nature of living wills when people give instructions as to*

*the procedure of their burial and other means of handling their body, including donation of their bodies to science. The article examines the possibility of the right of ownership to organs and tissue separated from the body after death. This right can exist if a complex legal construct is present, including a direct or assumed living will of the person. The specific characteristics of living acts concerning the possibility of after-death organ and tissue harvesting for further use, including for transplantation purposes, and the differences between such acts and last wills are determined.*

*Keywords: human body; possession; last will; bequest; right of “ownership” to a body; personal non-property rights.*

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## Introduction

The human body has always been the subject of philosophical and religious thought. According to the most ancient written source – the Vedas – matter (body) is a dead substance that does not possess reason or life, while the soul is a living being that animates the material body. In his treatise “*De Anima*” (“On the Soul”), Aristotle tells us that the soul is the form of a living thing (*logos*) that in virtue of which it is the kind of living thing that it is ... the soul is inseparable from the body.<sup>1</sup>

St. Paul insisted that the body is a temple of the Holy Spirit (1 Cor. 6:19-20):

Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God? You are not your own; you were bought at a price.

Medieval philosophers considered the human body, like other bodies, to be an incarnation of divine thought – a unity of form and matter. It is interesting that for

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<sup>1</sup> Аристотель. О душе (книга вторая) [Aristotle, *On the Soul (Book II)*], at 11–12 (Aug. 24, 2020), available at [www.bookscafe.net](http://www.bookscafe.net).

many centuries the body was considered to be a vessel for the soul, the immortal soul. Nineteenth-century philosophers focused more on understanding carnality as such, the life of the body, its influence on the thoughts and emotions of man, on the connections between the body and the mind. The body was viewed as an object of art, a social phenomenon, a system, and so on.

If one sets aside the religious, philosophical, social and physiological aspects related to the essence of human nature (which is very difficult), a human being can be defined as a living creature that possesses the gift of reason and speech and is capable of producing and using tools. A living human being is an inseparable unity of intangible components – thoughts, ideas, beliefs – and the material foundation which is the biological organism, the body.

### **1. Disposal of the Body, Organs and Tissue of a Living Human Being**

Various legal studies consider the human body from different positions – as an object of a crime, as an object of medical interference, etc. As far as civil law is concerned, one of the most discussed issues is the matter of establishing real (property) rights in relation to the body. In this discussion of the right to the body of a living person considerable attention is given to whether or not it is acceptable to consider the body to be a possession, which is what the object of civil law is. Sergeev defined possessions as “valuables of the material world given by nature and created by man that are objects of civil rights.”<sup>2</sup> A possession must be material, limited in space, capable of being possessed by man and satisfying the needs of man.<sup>3</sup> Often, *usefulness* is seen as a defining characteristic of a possession; however, this characteristic is subjective, and it is likely a less precise description of the understanding of a possession as a material object that serves to satisfy the needs of man.

The fact that the body is material and limited in space is undoubted. That is why the argument against considering the human body to be a possession is based on the fact that the body is not a result of labor and it does not have material (economic) value, because it was created as the result of a natural biological process.<sup>4</sup> However,

<sup>2</sup> Абрамова Е.Н., Аверченко Н.Н., Байгушева Ю.В. и др. Гражданское право: учебник: в 3 т. Т. 1 [Elena N. Abramova et al., *Civil Law: Textbook. In 3 vols. Vol. 1*] 1675 (A.P. Sergeev (ed.), Moscow: TK Velbi, 2009).

<sup>3</sup> Гражданское право: учебник: в 2 т. Т. 1 [Civil Law: Textbook. In 2 vols. Vol. 1] 528 (B.M. Gongalo (ed.), Moscow: Statut, 2016).

<sup>4</sup> See Баумова Ж.С. Некоторые проблемы правового регулирования трансплантации органов и тканей человека // Юридические науки. 2017. № 4. С. 67–70 [Zhanna S. Baumova, *Some Problems of Legal Regulation of Transplantation of Human Organs and Tissues*, 4 Legal Studies 67 (2017)]; Волож З.Л. Право на кровь // Вестник советской юстиции. 1928. № 7. С. 215–216 [Z.L. Volozh, *Right to Blood*, 7 Soviet Justice Herald 215 (1928)]; Красновский Г.Н., Иванов Д.Н. Актуальные вопросы правового регулирования трансплантации органов и тканей в Российской Федерации // Вестник Московского университета. Сер. Право. 1993. № 5. С. 50–54 [G.N. Krasnovsky & D.N. Ivanov, *Current Issues of Legal*

not all objects that are defined as “possessions” under civil law are the results of human labor and some of them have natural (biological) origins. For example, animals and plants have natural (biological) origins, and land plots are not the result of human labor – yet, both are recognized as “possessions.”

Nevertheless, it is commonly recognized that a living human being (representing unity of mind and body) is not an object of any right, nor an object of real (property) rights, due to the fact that the subject and object cannot be the same thing. Thus, Shershenevich, who is often referenced in the studies devoted to the human body (including organs and tissue), wrote:

Recognizing the physical and moral properties of man as an object of right contradicts the philosophical understanding of an object as something that exists outside a subject.<sup>5</sup>

Gambarov had a similar thought:

The definition of subject incorporates the human body, which is how objective law interprets it.<sup>6</sup>

When considering the relationship between man and his body, it is important that subjects cannot have property rights to themselves (the subject and the object cannot be the same thing).

Several contemporary studies that were written in order to justify the inclusion of human organs and tissue in turnover prove the existence of the so-called “somatic” rights and suggest that humans have special property rights to their bodies. According to Nesterova,

The human body is an object of the right of ownership and has monetary value in most cases.<sup>7</sup>

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*Regulation of Body and Tissue Transplantation in the Russian Federation*, 5 Moscow University Herald. Law Series 50 (1993)]; Красновский Г.Н. Биоэтические и уголовно-правовые проблемы в законе Российской Федерации «О трансплантации органов и (или) тканей человека» // Государство и право. 1993. № 12. С. 69–75 [G.N. Krasnovsky, *Bioethical and Criminal Law Problems in the Law of the Russian Federation “On Transplantation of Human Organs and/or Tissue,”* 12 State and Law 69 (1993)].

<sup>5</sup> See Шершеневич Г.Ф. Учебник русского гражданского права [Gabriel F. Shershenevich, *Textbook on Russian Civil Law*] 556 (Moscow: Spark, 1995).

<sup>6</sup> See Гамбаров Ю.С. Гражданское право. Общая часть [Yuri S. Gambarov, *Civil Law. General Part*] 816 (V.A. Tomsinov (ed.), Moscow: Zertsalo, 2003).

<sup>7</sup> See Нестерова Е.М. Понятие и юридико-социальная сущность соматических прав человека // Социально-экономические явления и процессы. 2011. № 7(029). С. 222–226 [Elena M. Nesterova, *The Meaning and Legally-Social Essence of Human Somatic Rights*, 7(029) Social and Economic Phenomena and Processes 222 (2011)].

Starovoytova identifies three groups of somatic rights:

- 1) the right to whole bodies; 2) the right to sell and purchase organs and tissue;
- 3) the right to sell “elements” of the human body (reproduction material).<sup>8</sup>

However, the supporters of this approach do not explain how, in principle, it may be possible that the subject and object of the right to a living human body can overlap. The construct of possession and property law in relation to one’s own body is, therefore, based on initially deficient presumptions.

The argument against the possibility of possessing property rights to another human’s body, because this ‘other’ human is an independent subject, is based on moral, social and, finally, contemporary legal reasoning, while those of us who studied Roman law at university must remember the “tools that speak.”<sup>9</sup> According to modern beliefs, a living human being (and his body) cannot be owned by another person (slavery is condemned as a crime in most of the world). Therefore, a human being does not constitute a possession in accordance with civil law.

The organs and tissue of a human body that are not separated from it cannot be considered to be independent objects, because they exist in an inseparable unity with the body. Accordingly, they do not have a different legal status from that of a living body. Consequentially, they cannot be considered to be possessions or any type of property. Therefore, property rights cannot apply to them. The subject matter of a legal transaction under which a person, for example, agrees to provide his body for painting on it is not the body as a possession, but the actions of the human being.

Most civics scholars refuse to accept the possibility of characterizing the rights in relation to our bodies as the rights of ownership, usage or disposal of a possession, and, therefore, the legality of applying the mechanisms of real (property) law and property rights in relation to a living human body (and the organs and tissue that are not separated from it).<sup>10</sup> It is true that a subject cannot own his body in a legal sense.

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<sup>8</sup> See Старовойтова О.Э. Юридический механизм реализации и защиты соматических прав человека и гражданина в Российской Федерации: юридико-правовой и теоретический анализ: автореф. дис. ... докт. юрид. наук [Olga E. Starovoytova, *Legal Mechanism of the Realization and Protection of the Somatic Rights of a Human Being and Citizen in the Russian Federation: Legal and Theoretical Analysis: Synopsis of a Thesis for a Doctor Degree in Law Sciences*] 43 (St. Petersburg, 2006).

<sup>9</sup> In the 1<sup>st</sup> century AD, Marcus Terentius Varro wrote: “Things that work the fields are divided into three types: tools that speak (vocalia) – slaves; tools that produce inarticulate sounds (semivocalia) – oxen; and tools that are mute (muta) – carts.” Кудрявцева Т.В. Рабство античное // Энциклопедия Всемирная история [Tatyana V. Kudryavtseva, *Ancient Slavery*, World History Encyclopedia] (Aug. 24, 2020), available at [https://w.histrf.ru/articles/article/show/rabstvo\\_antichnoie](https://w.histrf.ru/articles/article/show/rabstvo_antichnoie).

<sup>10</sup> Аполинская Н.В. Вновь к вопросу о посмертном донорстве органов, тканей человека // Сибирский юридический вестник. 2007. № 3. С. 21–24 [Nina V. Apolinskaya, *Again to the Matter of Postmortem Donation of Organs, Tissue of Humans*, 3 Siberian Law Herald 21 (2007)]; Малеина М.Н. Личные неимущественные права граждан: понятие, осуществление, защита: дис. ... докт. юрид. наук [Marina N.

In the same way, the subject cannot use his body as something external; disposal of one's body – especially in its extreme form – transferred to another person is absolutely impossible.

Most Russian civics scholars view the body of a living human being as an immaterial benefit (right to life and health, right to dignity, personal inviolability).<sup>11</sup> While exercising the right to personal inviolability and the right to health, a subject may independently decide to provide his organs and tissue for the purpose of medical procedures, including their extraction for transplantation in accordance with the procedure established under the law. The need for restrictions in this situation is dictated by the imperative to prevent misuse and abuse. It is of this abuse that sociologists and philosophers concerned with commodification and exploitation of human bodies write.<sup>12</sup>

Moral and ethical concerns are also voiced in the works of those specialists who do not recognize that the organs and tissue separated from the human body have a proprietary nature. In this situation it is proposed to consider them to be objects of personal non-property rights.

The organs and tissue separated from a living human body lose the connection with the personality of the human being and can be considered to be objects (things). This point of view is currently the prevailing one.<sup>13</sup> After their separation from the

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Maleina, *Personal Non-Property Rights of Citizens: Notion, Realization, Protection: Thesis for a Doctor Degree in Law Sciences*] 88 (Moscow, 2001); Донцов Д.С. Тело живого человека как нематериальное благо и гражданско-правовая защита его физической неприкосновенности // Медицинское право. 2011. № 2. С. 38–42 [Denis S. Dontsov, *Body of a Living Human Being as a Non-Material Benefit and the Civil and Legal Protection of His Physical Inviolability*, 2 Medical Law 38 (2011)].

<sup>11</sup> Красавчикова Л.О. Понятие и система личных неимущественных прав граждан (физических лиц) в гражданском праве Российской Федерации: дис. ... докт. юрид. наук [Larisa O. Krasavchikova, *The Notion and the System of Personal Non-Property Rights of Citizens (Natural Persons) in Civil Law of the Russian Federation: Thesis for a Doctor Degree in Law Sciences*] 425 (Yekaterinburg, 1994); Майфат А.В., Лисаченко А.Б. Тело человека, его отдельные части как объекты правового воздействия (некоторые предложения для обсуждения) // Юридический мир. 2002. № 2. С. 4–15 [Arkady V. Mayfat & Alexey V. Lisachenko, *The Human Body, its Separate Parts as Objects of Legal Influence (Some Proposals for Discussion)*, 2 Legal World 4 (2002)]; Щенникова Л.В. Вещное право: учебное пособие [Larisa V. Shchennikova, *Property Law: Textbook*] 240 (Perm: Perm University Press, 2001).

<sup>12</sup> Leonardo D. de Castro, *Commodification and Exploitation Arguments in Favor of Compensated Organ Donation*, 29(3) Journal of Medical Ethics 142 (2003).

<sup>13</sup> Малеина М.Н. Личные неимущественные права граждан (понятие, осуществление и защита) [Marina N. Maleina, *Personal Non-Property Rights of Citizens (Notion, Realization and Protection)*] 431 (Moscow: Nauka, 1997); Марзайская Н.А. Гражданско-правовые вопросы трансплантации и донорства // Вестник Московского университета. Сер. Право. 1980. № 2. С. 83–89 [Nadezhda A. Margatskaya, *Civil and Legal Problems of Transplantation and Donorship*, 2 Moscow University Herald. Law Series 83 (1980)]; Синицын С.А. Исковая защита вещных прав в российском и зарубежном гражданском праве: актуальные проблемы [Sergey A. Sinitsyn, *Enforceability of Proprietary Rights in Russian and Foreign Civil Law: Current Problems*] 340 (Moscow: Infotropik Media, 2015); Стеценко С.Г. Право и медицина: проблема соотношения [Semen G. Stetsenko, *Law and Medicine: Correlation Problems*] 248 (Moscow: International University, 2002); Сальников В.П., Стеценко С.Г. Трансплантация органов и тканей человека: проблемы правового регулирования [Victor P. Salnikov & Semen G. Stetsenko, *Human Organ*

body, organs and tissue have the characteristics of materiality and availability for possession. In this situation,

the moment of their actual reification (turning into a thing) is the moment they are separated (disconnected, isolated) from the human organism as a result of surgical intervention, an accident or a natural process.<sup>14</sup>

There is no doubt that many organs and tissue of a human being separated from the body are useful and have market value. A long time before the present discussion, cut-off hair was considered to be a common object of turnover (a possession) and was used to make wigs and other objects (think of the touching short story “The Gift of the Magi” by O’Henry, or the purse made by Gulliver from the hair of the Queen of Brobdingnag).

The discussion of the legal status of human organs and tissue separated from the body was triggered by the advancement of blood transfusion and organ transplantation. Thus, the world’s first successful blood transfusion procedure was performed in 1818 by the British obstetrician James Blundell; he went on to perform ten similar procedures, half of which were successful. In Russia, blood transfusion was pioneered by the obstetrician G. Wolfe in 1932.

The first-ever successful transplantation of a kidney from a living donor was performed in 1991 by the surgeon J. Murray, who, as a result, was awarded the Nobel Prize in Medicine. The possibility of transplanting a lung was confirmed by the Russian scientist V. Demikhov in 1947, but such surgeries became successful only in the 1980s, once a new generation of immunodepressants became available.

Nowadays, according to the World Health Organization (WHO), 100,800 whole-organ transplantations are performed every year: 69,400 kidney transplants (46% from living donors), 20,200 liver transplants (14.6% from living donors), 5,400 heart transplants, 3,400 lung transplants and 2,400 transplantations of the pancreas.<sup>15</sup>

The successful development of transplantology has turned human organs and tissue into something extremely valuable, and the discussion of the possibility of considering them to be objects of civil law has become not just educational, but of practical importance.

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*and Tissue Transplantation: Problems of Legal Regulation*] 140 (St. Petersburg: Foundation “Universitet,” 2000); Суховерхий В.Л. Гражданско-правовое регулирование отношений по здравоохранению // Советское государство и право. 1975. № 6. С. 105–109 [V.L. Sukhoverkhiy, *Civil Regulation of Relationships in Healthcare*, 6 Soviet State and Law 105 (1975)]; Krasnovsky & Ivanov 1993.

<sup>14</sup> Мызров С.Н., Нагорный В.А. К вопросу о вещно-правовом статусе органов и тканей человека: дифференцированный подход к разрешению проблемы // Медицинское право. 2014. № 3. С. 35–40 [Sergey N. Myzrov & Victor A. Nagorny, *Concerning the Matter of Proprietary Status of Human Organs and Tissue: A Differentiated Approach to Solving the Problem*, 3 Medical Law 35 (2014)].

<sup>15</sup> See the official website of the World Health Organization, section “Transplantation”: <https://www.who.int/transplantation/gkt/statistics/ru/>.



One of the arguments used to confirm that human organs and tissue cannot be considered to be possessions (things) even after they are separated from the body is that “they were formed as a result of a natural biological process.”<sup>16</sup> The weakness of this argument was confirmed above when we discussed the approaches to the body as a whole. The opinion of S. Shevchuk can be quoted as an additional argument supporting the idea that the biological, natural origin of an object does not mean it cannot be recognized as a thing (possession). Shevchuk noted that blood and its components were also formed as the result of natural processes; however, non-gratis (paid) donorship is permitted by law.<sup>17</sup> The same can be said of human hair, which has traditionally been a subject matter of transactions, and about breast milk, etc.

Another argument to confirm that it is impossible to classify human organs and tissue as a special type of thing (possession) is the fact that their value (cost) is formed based on the cost of transplantation services, not on the cost of an organ or tissue itself. Therefore, they cannot be considered to be subject matter of legal transactions.<sup>18</sup> Having said that, this does not exclude the possibility of considering an object a possession – there are many things whose value in turnover is determined based on their rarity and usefulness, while the cost of the labor spent on their extraction from the natural environment is insignificant compared to their market price (for example, valuable types of wood, precious stones).

Some authors explain the impossibility of applying a proprietary status to separated organs and tissue by the fact that it is impossible to exercise powers of ownership, use and disposal in relation to them. As confirmation, they refer to the situation with donorship and transplantation when, according to the authors, the recipients of such tissue do not exercise any powers, because all actions are carried out by personnel of a medical facility that is entitled to exercise the right of ownership to such objects for a time.<sup>19</sup> It is true that the donor does not perform any usual acts of control or disposal in relation to the transplanted organs after their separation and does not have any opportunity to do so. However, it is also obvious that the authors' view of the possibility of realizing the powers of an owner is over-simplified. Quite often a proprietor owns property and uses it indirectly by providing this opportunity to other parties. Understanding that the stated argument

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<sup>16</sup> Krasnovsky & Ivanov 1993.

<sup>17</sup> Шевчук С.С. О некоторых проблемах совершенствования законодательства в сфере здравоохранения // Современное право. 2002. № 1. С. 21–24 [Svetlana S. Shevchuk, *On Some Problems of Improvement of Healthcare Laws*, 1 Modern Law 21 (2002)].

<sup>18</sup> See Krasnovsky 1993; Volozh 1928.

<sup>19</sup> Даутбаева-Мухтарова А.Е. Использование органов и тканей человека в трансплантологии как особых объектов гражданского права // Вестник Института законодательства и правовой информации Республики Казахстан. 2014. № 1(33). С. 35–38 [Aliya E. Dautbayeva-Mukhtarova, *Use of Human Organs and Tissue in Transplantology as Objects of Civil Law*, 1(33) Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan 35 (2014)].



does not contradict the possibility of recognizing that separated organs and tissue have a proprietary nature, one author stipulates that we must speak of “property rights of a special nature that are somewhat similar to proprietary rights” and of the existence of a donor’s “right of disposal” (control).<sup>20</sup> The essence of such a special right and its difference from the right of ownership is not elaborated by the author. Considering that the author recognizes the proprietary nature of separated organs and the possibility of disposing of (controlling) them, her denial of the proprietary nature of such an object of rights is groundless. It is also important to note that interpreting the right of ownership as powers of ownership, use and disposal is also erroneous, because the essence of the right of ownership is the fixation of the belonging of material benefits, while the powers included in it may be exercised by other persons (for example, a trust manager actually exercises all of the rights of an owner, but this does not mean that the owner does not have the rights, or that it is a “different type of proprietary right”).

In addition, the reported arguments concern only transplanted organs and do not include other objects, for example, blood and its components, or reproductive cells, which can exist outside the body for a significant period of time. During this period, the proprietor may need to implement measures to safekeep and protect the indicated organs.

Serebryakova, Arzamaskin and Varyushin explain the special character of the organs and tissue separated from the body in terms of a close personal connection with the donor:

At the moment of separation, a new object appears. Due to its close personal connection with the donor, it is impossible to unambiguously classify it as a thing.<sup>21</sup>

Nevertheless, the authors alluded to recognize the material nature of the indicated objects (recognize them as things), because they are objects of the material world that can be possessed by a human being and serve to satisfy his needs.

A determination of “special nature” is needed to justify the idea of a special property right – “the right of transplantation use” – that, according to the authors, should be absolute, but limited in time, and have a specific purpose. This right is provided on a gratis (non-gratis) basis along with the object of transplantation to a medical institution that has a license to harvest and store transplantation objects,

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<sup>20</sup> Dautbayeva-Mukhtarova 2014.

<sup>21</sup> Серебрякова А.А., Арзамаскин М.М., Варюшин М.С. Государственно-правовое регулирование использования органов и тканей человека в целях трансплантации как особых объектов гражданского права (компаративистское исследование) // Власть. 2011. № 8. С. 155–157 [Alla A. Serebryakova et al., *Government and Legal Regulation of the Use of Human Organs and Tissue for the Purpose of Transplantation as Objects of Civil Law (a Comparative Study)*, 8 Power 155 (2011)].

and the latter exercises this right when implanting the object into a recipient's organism.<sup>22</sup> The authors do not explain why this property right is not the right of ownership and why the special object not classified as a possession by them becomes the object of real (property) rights. In addition, it seems strange for the donor to "have the right of transplantation use," because the donor himself can never use his organs. It seems that this right should be called "the right to provide one's organs for transplantation."

The position of Apolinskaya appears more developed and logical. She suggests a new term – "biological object" – which includes human organs and tissue, and proposes to consider them to be another type of property, to which there may be two types of rights:

1) the right of ownership to a biological object (bio-ownership right) that provides its holder (and only a donor can be the holder of such right) with both property and non-property possibilities (the only object to which this right does not apply is the body after death – it is an object of another type of a bio-right), 2) the exclusive property right to a biological object (another bio-right) – belongs to all other persons acquiring bio-objects – provides its holder with a wide range of rights in relation to bio-objects that are identical to the property component of the bio-ownership right (with the exception of recipients and specialized medical centers in certain situations).<sup>23</sup>

Concerning the differences between the right of ownership and the right of bio-ownership, Apolinskaya explains that the content of the right of ownership to human bio-objects includes two components: personal non-property rights and property rights that a person gains in relation to the separation (extraction) of biological objects from his organism.<sup>24</sup>

From the point of view of the classical construct of the system of civil rights, a combination of property rights and non-property rights within the framework of the same right is impossible. It is only possible to combine various subjective rights in relation to one object – for example, different in nature rights apply to a result of intellectual activity – an exclusive right (proprietary, absolute) and personal non-property rights of the same subject (proprietor). This does not mean that these rights comprise some special single right.

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<sup>22</sup> Serebryakova et al. 2011.

<sup>23</sup> Аполинская Н.В. Биологические объекты человека в гражданском праве Российской Федерации: автореф. дис. ... канд. юрид. наук [Nina V. Apolinskaya, *Human Biological Objects in the Civil Law of the Russian Federation: Synopsis of a Thesis for a Candidate Degree in Law Sciences*] 22 (Irkutsk, 2009).

<sup>24</sup> *Id.*

It is obvious that Apolinskaya is attempting to combine various approaches that exist in Russian civics.

One such approach is supported by specialists who believe that even after separation human organs and tissue can be considered only to be objects of a person's non-property rights (right to health, physical inviolability, etc.), and object to the possibility of recognizing them as things.<sup>25</sup> Dontsov views human organs and tissue as a special object – "non-property material benefits."<sup>26</sup>

This point of view is based on moral and ethical reasoning, concerns about the dangers of commercialization of donorship, the special status of the human body, and the close connection of the organs and tissue to the individual.

Another approach is represented by specialists who believe that the personal connection to a human being is lost at the moment the organs are separated, and the latter become "things." Krasavchikova suggests that human organs are personal non-property benefits which lose their individual identity after extraction and may be considered to be things.<sup>27</sup>

According to other authors, a person can have non-property rights in relation to the organs separated from his body, and these organs can simultaneously be recognized as things (possessions). This construct is offered by Maleina who points out that,

At the moment of their separation, the organs and tissue of a living person simultaneously become objects of the right of ownership and of the right to physical inviolability.<sup>28</sup>

Evseev agrees with this point of view.<sup>29</sup>

It appears that if we recognize the existence of the right of ownership of a subject (a donor) to the body parts separated from his body (organs, tissue), this would give him all the power over these objects and provide him with absolute protection from all other persons. Such protection would be more effective than if these objects were recognized as objects of non-property rights. It would also include physical inviolability and the right to dignity of any individual. At the same time, we have to recognize that in order for the right of ownership of organs and tissue to exist, the simple fact of their separation from the body ("physical reification") would be insufficient. The possibility of using organs for transplantation and transfusion has to be determined by the person himself in accordance with his personal non-property

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<sup>25</sup> Mayfat & Lisachenko 2002.

<sup>26</sup> Dontsov 2011, at 43–46.

<sup>27</sup> Krasavchikova 1994.

<sup>28</sup> Maleina 1997.

<sup>29</sup> *Евсеев Е.Ф. Правовой статус человеческого организма // Адвокат. 2010. № 6. С. 34–40 [Evsey F. Evseev, *The Legal Status of a Human Organism*, 6 Attorney 34 (2010)].*

rights. Otherwise, if the person does not wish for this separation to happen, or if the separated part is used in contradiction to the will of the subject, we would be dealing with a crime. Thus, forcing anyone to agree to a transplantation can result in a prison sentence of up to four years in accordance with Article 120 of the Criminal Code of the Russian Federation.<sup>30</sup>

The fact that in some situations certain body parts are disposed of on a non-gratis basis (for example, non-gratis blood donorship which is allowed in compliance with subparagraph 1 of paragraph 2 of Article 12 of the Federal Law "On the Donation of Blood and its Components"<sup>31</sup>), does not mean that this act cannot be considered to be an exercise of personal non-property rights.

Providing other persons with an opportunity to use the object of protection of such rights in some situations is directly stipulated by civil law. For example, according to paragraph 4 of Article 19 of the Civil Code of the Russian Federation, it is possible to use the name of a natural person or his pseudonym with the consent of this person for creative, entrepreneurial and other types of economic activity, provided that third parties are not misled as to the identity of the person. When exercising this non-property right – the right to a name – the subject of the right can enter into transactions, including non-gratis ones, to provide the right to use his name. A similar situation occurs when a person well-known in the Russian Federation permits the use of his name, pseudonym or a derivative thereof, a portrait or a facsimile as a trademark (subpara. 2 of para. 9 of Article 1483 of the RF Civil Code) – such consent may be given both on a gratis and on a non-gratis basis.

In these situations, a non-gratis transaction concluded within the framework of the exercise of personal non-property rights is possible. This possibility is more of an exception than a rule, and gives rise to many questions. Nevertheless, it is important to note that even after such transactions are concluded, the personal non-property right of the subject is not terminated, but continues to exist, which makes it possible to lodge claims against the party who was granted the right to use the name of a natural person, if such use is qualified as misuse or abuse.

When exercising his right to physical inviolability and health, a person can either take voluntary action to separate his tissue, use it and dispose of it (including destruction) or he can allow the separation and use of his organs and tissue for specific purposes. In our opinion, it is the expression of the will of the person that is the required legal determiner that transforms the separated organs and tissue from

<sup>30</sup> Козьякова Н.С. Правовое регулирование трансплантологии органного донорства в России и зарубежных странах (компаративный анализ) // Вестник Московского государственного областного университета. Серия: Юриспруденция. 2017. № 3. С. 99–114 [Natalia S. Kozyakova, *Legal Regulation of Transplantation of Donated Organs in Russia and Foreign Countries (a Comparative Analysis)*, 3 Moscow Regional University Herald. Jurisprudence Series 99 (2017)].

<sup>31</sup> Федеральный закон от 20 июля 2012 г. № 125-ФЗ «О донорстве крови и ее компонентов» // СПС «КонсультантПлюс» [Federal Law No. 125-FZ of 20 July 2012. On the Donation of Blood and its Components, SPS "ConsultantPlus"] (Aug. 24, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_132904/](http://www.consultant.ru/document/cons_doc_LAW_132904/).

personal non-property rights into objects of property rights (rights of ownership). Having said that, we need to point out that the personal non-property rights of the subject do not cease to exist in this situation, but continue to exist and to significantly impact the legal status of the organs and tissue separated from the person.

This is why there is no need for the “double” legal status proposed by Apolinskaya, or for the establishment of a special right of “bio-ownership” that combines personal non-property and personal property rights of a donor, because these rights that are so different in nature are not combined, but exist independently while nevertheless influencing each other.

It is clear that the existence of different positions concerning the legal status of human organs and tissue after their separation can be explained by the fact that the problem discussed here is new, and by the fact that the legislator is not very concerned with the need to determine the possibilities and the order of recognition of the physical objects discussed here as objects of civil law. The complexity of the legislator’s position is, in turn, explained by the fact that a whole array of moral and ethical aspects related to the turnover in human organs and tissue needs to be taken into account. This is further complicated by the fact that the situation is constantly changing – the advancement of high-tech medicine results in a growing number of possibilities for the use of human organs and tissue. For example, in the past few years new studies have appeared that confirm the possibility of human cloning with the use of human genetic material that can be extracted from practically any cell of the organism.

It is obvious that as a rule human organs and tissue after their separation from the body (with some exceptions) cannot be freely circulated even though they are recognized as things (items). The following authors classify organs and tissue separated from a living human being as limitedly “circulatable” items: Evseev,<sup>32</sup> Shevchuk,<sup>33</sup> Mokhov, Melikhov,<sup>34</sup> Rashidkhanova,<sup>35</sup> Kulitskaya,<sup>36</sup> Safonova, Karpova,<sup>37</sup> and Sukhoverkhiy.<sup>38</sup>

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<sup>32</sup> Evseev 2010.

<sup>33</sup> See Shevchuk 2002, at 24.

<sup>34</sup> Мохов А.А., Мелихов А.В. Клетки как объект гражданских и иных правоотношений // Медицинское право. 2008. № 2. С. 50–58 [Alexander A. Mokhov & A.V. Melikhov, *Cells as Objects of Civil and Other Relationships*, 2 Medical Law 50 (2008)].

<sup>35</sup> Рашидханова Д.К. Репродуктивные права личности: сущность и правовая природа // Социальное и пенсионное право. 2007. № 4. С. 40–44 [Diana K. Rashidkhanova, *Reproductive Rights of the Individual: Essence and Legal Nature*, 4 Social and Pension Law 40 (2007)].

<sup>36</sup> Кулицкая Л.И. Правовой режим органов, тканей, клеток и тела человека после смерти лица, не оставившего завещания // Власть Закона. 2016. № 2. С. 96–106 [Lydia I. Kulitskaya, *The Legal Status of Human Organs, Tissue, Cells and Body After the Death of a Person Who Did Not Leave a Will*, 2 Rule of Law 96 (2016)].

<sup>37</sup> Сафонова Е.Ю., Карпова Д.Ю. К вопросу регулирования трансплантации тканей и органов человека // Юридическая наука. 2012. № 3. С. 52–54 [Elena Yu. Safonova & Daria Yu. Karpova, *Concerning the Regulation of the Transplantation of Human Tissue and Organs*, 3 Legal Science 52 (2012)].

<sup>38</sup> See Sukhoverkhiy 1975, at 109; Margatskaya 1980, at 84–85.

Depending on the nature of the tissue and organs separated from a body, they may have the status both of items not limited in turnover (hair, nails) and of items limited in turnover. The nature of limitations may vary. The RF Civil Code currently does not use the term “items excluded from turnover”; therefore, there is no need to analyze the proposals to classify the objects discussed here as such.

The strictest limitations are set in relation to the organs included in the List of Transplantation Objects.<sup>39</sup> There are 24 items on this List, including the vascularized complex of soft tissue, the dermis, subdermal fat and muscles, upper and lower extremities and fragments thereof, the eyeball (cornea, sclera, eye-lens, conjunctiva); the intestinal tract and fragments thereof, the heart-lung complex; the bones of the base of the skull, bone marrow and stem cells, blood vessels, the trachea, endocrine glands (the pituitary gland, the adrenal gland, the thyroid gland, the salivary gland and the testicles). The list of donor organs for the purposes of living donation included in the draft of the Federal Law “On Donorship of Human Organs and Their Transplantation” includes the kidney, a portion of the liver, a portion of the small intestine, the lappet and a portion of the pancreas.<sup>40</sup>

The terms of organ and tissue harvesting for the purpose of transplantation are established under the Federal Law “On the Framework of the Health of Citizens in the Russian Federation.”<sup>41</sup> Specifically, this Law establishes that it is permitted to harvest organs and tissue for the purposes of transplantation from a living donor with his informed voluntary consent (para. 4 of Art. 47) only in cases where the medical board of the relevant medical institution finds that this will not cause significant harm to the health of the donor. It is not permitted to harvest organs and tissue for the purpose of transplantation from living persons under the age of 18 or those deemed legally incapacitated. The only exceptions are bone marrow transplants.

The constructs used in this Law make it possible for us to reach certain conclusions that confirm an expression of the will of the donor which is required (in the form of informed voluntary consent) – it is not an act of realization of property rights to his body and organs, but an act within the framework of personal non-property

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<sup>39</sup> Приказ Минздрава России и Российской академии наук от 4 июня 2015 г. № 306н/З «Об утверждении перечня объектов трансплантации» // СПС «КонсультантПлюс» [Order of the Ministry of Healthcare of the Russian Federation and the Russian Academy of Sciences No. 306n/3 of 4 June 2015. On Approval of the List of Transplantation Objects, SPS “ConsultantPlus”] (Aug. 24, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_181448/](http://www.consultant.ru/document/cons_doc_LAW_181448/).

<sup>40</sup> See Проект федерального закона «О донорстве органов человека и их трансплантации» // Министерство здравоохранения Российской Федерации [Draft of the Federal Law “On Donorship of Human Organs and Their Transplantation,” Ministry of Health of the Russian Federation], Art. 9 (Aug. 24, 2020), available at <https://minzdrav.gov.ru/documents/8145>.

<sup>41</sup> Федеральный закон от 21 ноября 2011 г. № 323-ФЗ «Об основах охраны здоровья граждан в Российской Федерации» // СПС «КонсультантПлюс» [Federal Law No. 323-FZ of 21 November 2011. On the Framework of the Health of Citizens in the Russian Federation, SPS “ConsultantPlus”] (Aug. 24, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_121895/](http://www.consultant.ru/document/cons_doc_LAW_121895/).

rights (right to health, right to physical inviolability). This is stipulated in the Law that prohibits the exercise of this right if it can lead to negative consequences for the donor's health.

The donorship of organs and tissue and transplantation thereof is regulated by the Federal Law "On the Transplantation of Human Organs and/or Tissue."<sup>42</sup> According to Article 1 of the Law, human organs and/or tissue cannot be the object of sale and purchase. This norm reflects international recommendations, in particular the Declaration of the World Medical Association on the trade in living organs that was adopted in 1985 and that urges all the world's governments to implement measures that would prevent such sale and purchase. Nevertheless, the current scope of this regulation is insufficient. It is necessary to clearly determine the types of transactions where human organs and tissue can be the subject matter. The prohibition contained in this norm must be extended to other non-gratis contracts where the subject matter is the transfer of rights (contracts of exchange, commission, etc.) to the indicated organs. Specialists rightfully note that transplants may belong only to concrete subjects and exist in turnover in compliance with special rules; they cannot be the subject matter of commercial transactions.<sup>43</sup>

The Law on Transplantation does not exclude the possibility in principle of harvesting organs and tissue from a living donor and of organ and tissue turnover on a gratis basis. In addition, transplants may be the objects of storage, transportation and other types of contracts related to the rendering of services and performance of work.

According to Bezverkhov, human organs are completely excluded from civil turnover, because, in his opinion, these objects cannot be the subject matter of sale, purchase or commercial transactions in compliance with the Law on Transplantation.<sup>44</sup> It is hard to agree with this point of view: first of all, the current RF Civil Code does not use the term "object excluded from turnover," and, secondly, the provisions of the discussed Law do not completely exclude the possibility of turnover in the indicated objects.

A special legal framework is established by Russian law in relation to donor blood. According to the WHO, in 2015 100% of blood in blood banks was provided by gratis donors in 56 countries, while in 58 countries gratis donors provided less than 50% of blood – a substantial portion is provided by family donors or paid (non-gratis) donors. The WHO urges governments to develop national blood-supply systems on

<sup>42</sup> Закон РФ от 22 декабря 1992 г. № 4180-1 «О трансплантации органов и (или) тканей человека» // СПС «КонсультантПлюс» [Law of the Russian Federation No. 4180-1 of 22 December 1992. On the Transplantation of Human Organs and/or Tissue, SPS "ConsultantPlus"] (Aug. 24, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_4692/](http://www.consultant.ru/document/cons_doc_LAW_4692/).

<sup>43</sup> Safonova & Karpova 2012.

<sup>44</sup> Безверхов А.Г. Имущественные преступления [Arthur G. Bezverkhov, *Property Crimes*] 193 (Samara: Samara University Publishing House, 2002).



the basis of voluntary gratis blood donations, because only such donors will be able to supply the required amount of safe blood.<sup>45</sup>

According to the Federal Law “On the Donation of Blood and its Components,”<sup>46</sup> one of the key principles of blood donorship is the support and motivation of gratis donorship (Art. 4), which does not exclude the possibility of non-gratis donorship. It is interesting how the Law determines the turnover in donor blood and its components – activities related to preparation, storage, transportation and clinical use of the blood and its components, as well as gratis transfer, provision for a fee, disposal, and import and export of blood and its components to and from the territory of the Russian Federation (para. 11 of Art. 2 of the Law). It is clear from the analysis of this provision of the Law that blood and its components may be the objects of both gratis and non-gratis transactions including with a donor’s participation (during blood donation) and without his participation (storage, transportation, provision to another person for a fee, etc.). The rules for such activities are established by the Government of the Russian Federation.

A blood donor must express his voluntary wish to donate blood and its components just as organ donors must permit the harvesting of organs and tissue. The Law establishes that donors have the right to donate blood and/or its components for free or for a fee, the right to be fully informed of the possible consequences of the donation of blood and/or its components, and the right to other measures of material and non-material support referred to by the Law.

The provisions of the Law quite clearly determine the transactions where donor blood can be the subject matter. It is quite impossible to argue with the fact that only things (possessions) can be the subject matter of storage or transportation contracts.

As we can see, the affirmation of the material (proprietary) nature of human organs and tissue separated from the body does not in itself mean that the principle of inadmissibility of commercialization of the human body would be violated or that it would be involved in civil turnover for illegal purposes, as some authors fear.<sup>47</sup> On the contrary, the recognition of the indicated objects as things (possessions) helps to limit their turnover in the most correct legal way and to solve other legal problems, such as the issue of applicable forms of protection. For example, in case of their illegal extraction (harvesting), an authorized subject may file a vindication lawsuit, or this fact can be qualified as theft in compliance with criminal law.

Special regulations including the rules that limit the circulatability of organs and tissue separated from a living human being currently mostly apply to relationships

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<sup>45</sup> Refer to the website of the World Health Organization, <https://www.who.int/ru>

<sup>46</sup> *Supra* note 31.

<sup>47</sup> See Ксенофонтова Д.С. Правовые проблемы создания и использования биопринтных человеческих органов // Lex russica. 2019. № 9. С. 109–118 [Daria S. Ksenofontova, *The Legal Problems of Creation and Use of Bio-Printed Human Organs*, 9 Lex Russica 109 (2019)].

related to such objects that can be used in medicine and have significant value for this reason. The legal acts reviewed above cannot be classified as acts of civil law, because of the nature of the norms contained in them. They are not concerned with the regulation of the turnover in human organs and tissue. It is obvious that the current situation calls for a clearer determination of acceptable transactions and requirements thereto (subject matter limitations, requirements as to how the parties must express their wishes, imperative requirements relating to the content of such transactions, etc.). The lack of such provisions makes room for conflicts and problems and leads to all sorts of legal risks, some of which have not yet been identified.

Numerous proposals to establish that human organs and tissue are special objects in Article 128 of the RF Civil Code<sup>48,49</sup> do not solve this problem.

Another option proposed is to insert a separate article in the RF Civil Code that will determine the principal terms of such transactions with references to other laws. In particular, Kulitskaya proposes to add an article entitled "Human Biological Materials" to chapter 6 of the RF Civil Code. She explains this proposal by the need to fix the special status of objects that exist in turnover, but are not formalized in law, and to determine that the circulatability of such objects is determined by a special law.<sup>50</sup>

Others suggest expanding the provisions of existing laws and inserting sections that will regulate the terms and the order of entry into civil transactions with the relevant objects. The latter option seems preferable, because it helps, first of all, to determine which organs and tissue require special regulation and, secondly, to take into account the specific features of different objects. Making common rules at this stage seems premature, because in some situations special rules are not presently required (for example, in relation to hair and breast milk), and in some cases such rules will merely boil down to setting special requirements for the destruction of such objects.

For example, Maleina rightfully notes that human organs and tissue are not limited to objects intended for transplantation, but also include those extracted (separated) in the course of medical interventions (amputation due to illness or trauma, including extremities, tumors, teeth; aborted fetuses and their organs (tissue), embryonic material (placenta, caul, amniotic fluid, umbilical cord), and those organs and tissue that were extracted (separated) not due to medical intervention and/or for the purpose of further use (cut-off hair; expressed breast milk; skin removed after plastic surgery, etc.).<sup>51</sup> It is noted that since such objects do not have value,

<sup>48</sup> See, e.g., Кудашова Т.Г. Признание органов и тканей человека объектами гражданского права: за и против // Известия Оренбургского государственного аграрного университета. 2012. Т. 3. № 35-1. С. 268–270 [Tatyana G. Kudashova, *Recognition of Human Organs and Tissue as Objects of Civil Law: Pros and Cons*, 3(35-1) Bulletin of the Orenburg State Agrarian University 268 (2012)].

<sup>49</sup> Myzrov & Nagorny 2014.

<sup>50</sup> Kulitskaya, *The Legal Status of Human Organs*, *supra* note 36.

<sup>51</sup> Малеева М.Н. Статус органов, тканей, тела человека как объект права собственности и права на физическую неприкосновенность // Законодательство. 2003. № 11. С. 22–49 [Marina N. Maleina,

they may be viewed as waste subject to disposal, the procedure of which is already determined by other norms of current law.<sup>52</sup>

At the same time, thanks to the development of medical technologies, the possibilities of using objects related to the human body are constantly expanding. This means that the turnover in such objects will require special regulation. In particular, some current issues under discussion include the problem of using genetic information that may be obtained from any cell of the human body and embryonic materials that are widely used in medicine, pharmacology and cosmetology.

The above discussion of the legal nature of the organs and tissue separated from a human being mostly revolves around the arguments for and against their recognition as things (possessions). However, even those specialists who support the idea that the discussed objects can be considered things (items, possessions), and consequently that the right of ownership may apply to them, do not analyze the essence of these relationships and even avoid determining the subject of such relationships. Some authors only see these subjects as forming the basis of pertinent proprietary law. Thus, Safonova and Karpova write:

The organs and tissue intended for transplantation ... in reality have the legal status of items limited in turnover, the title (right of ownership) to which belongs to the citizen from whom they were extracted or to his heirs.<sup>53</sup>

Apolinskaya also writes that the right of bio-ownership belongs to the donor.<sup>54</sup>

Another opinion is expressed by Lisachenko and Mayfat who base their conclusions on the opinion of O. Ioffe that in order to effect appropriation and in order for the right of ownership to exist it is insufficient to just have a "natural substance," but the process of labor must be carried out as well. They believe that the right of ownership in relation to the transplanted organs belongs to the medical institution, because the object of the right of ownership appears as a result of its labor.<sup>55</sup> It is hard to agree with this point of view, because it contradicts an earlier position of the same authors who considered human organs to be objects of personal non-property rights. The exercise of such rights by a subject may result in the emergence of his right of ownership, but how this right may emerge for another person is unclear. The fact that the organs were extracted as a result of the labor of medical personnel cannot justify this conclusion.

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*Status of Human Organs, Tissue and Body as Objects of Proprietary Rights and the Right to Physical Invulnerability*, 11 Legislation 22 (2003)].

<sup>52</sup> Evseev 2010.

<sup>53</sup> Федорова Г.Ю. Правовое регулирование трансплантации головы в Российской Федерации // Молодой ученый. 2017. № 36(170). С. 64–66 [G.Yu. Fedorova, *Legal Regulation of Transplantation of the Head in the Russian Federation*, 36(170) Young Scientist 64 (2017)].

<sup>54</sup> Apolinskaya 2009.

<sup>55</sup> Mayfat & Lisachenko 2002.

If we follow the logic suggested by Lisachenko and Mayfat, we will have to recognize hairdressers as owners of the hair that they cut off, and the people helping a woman to express her breast milk as owners of the milk. This clearly contradicts the normal order of things – any client of any hair salon is entitled to use his hair, and any woman is entitled to dispose of her milk as she sees fit.

In our opinion, the right of ownership in the situation of organ or tissue extraction for transplantation, transfusion, tests and studies and other purposes (scientific, educational, etc.) exists for the donor because it is the expression of his will that has the prevailing importance for the separation of tissue or organs for a specific purpose – transplantation or anything else. The actions of the medical personnel only help to realize the donor's intent and, despite their complexity and intensive labor, cannot serve as grounds for their right of ownership to separated organs. At the same time, a medical institution that extracts organs and tissue can have such a right if the donor gives the relevant instructions within the framework of his informed consent. In some situations, such instructions are assumed (implied) – for example, in the case of blood donations the donor obviously has no intention of exercising any further right to this blood and can no longer be considered to be the owner of the blood.

As a specific characteristic of the exercise of the donor's right of ownership to organs and tissue intended for transplantation, we can point out the fact that the donor does not actually exercise the powers of ownership and use of such objects, and his control of them (right of disposal) is limited to allowing the possibility of their use for transplantation purposes. Additionally, in a typical situation the period of existence of such a right is very short, because after transplantation the organ becomes an integral part of the recipient's body, while the donor's rights to it cease to exist. Nevertheless, if the donor is recognized as an owner of such objects, it will help him in certain situations to use proprietary remedies and defense mechanisms – for example, in the case of an unlawful appropriation of the object by a third party.

The same approach is applicable in other situations when the transplantation or use of an organ or tissue is not immediate, when the extraction is made for other purposes (studies, lab tests, genetic tests): if the person from whom the organs and tissue were extracted is recognized as their owner, it will help to settle various conflicts that can occur in case of their unlawful appropriation, loss or destruction.

In particular, the proposed approach is applicable to relationships arising in cases of cryogenic conservation and storage of reproductive cells and the tissue of reproductive organs and embryos. These relationships are currently regulated by by-laws. Thus, there is an indication of the citizens' right to cryogenic conservation and storage of their reproductive cells, tissue of reproductive organs and embryos in the Order of the Ministry of Healthcare of the Russian Federation of 30 August 2012 No. 107n "On the Order of the Use of Auxiliary Reproductive Technologies, Counterindications

and Limitations of their Use.”<sup>56</sup> The Order also provides a list of organizations that have the right to render the services of cryogenic conservation and storage of the indicated biomaterials. The Order likewise establishes the rules of harvesting, storage and transportation of the biomaterials. Due to its nature, the specified by-law does not contain provisions that determine the legal status of the collected biomaterial; however, indication of the fact that it can be stored (for a fee) and transported makes it possible to speak of the indicated objects as property items. The obtained biomaterial should be recognized as an object of the donor’s right of ownership.

By recognizing organs and tissue as objects of the right of ownership of a subject from whose body they were separated, we are faced with the need to determine the possibility of their transfer by way of inheritance. In the majority of cases, due to the fact that the period of transfer of the objects to other persons is very short (in the case of transplantation, for example), the question of inheritance does not require any discussion. However, in some situations, in the case of the death of the donor whose tissue was made available for scientific research, the issue becomes a matter of practical importance. From a formal point of view, such objects as property items must be part of the deceased’s estate, and the powers of the owner should be exercised by the heirs. However, firstly, the exercise of such powers is dependent on the will of the deceased that is binding for the heirs who cannot change his will – if, for example, he determined the purpose of the tissue taken from him; and, secondly, the right of ownership must be exercised by the heirs with consideration of the protection of the non-property rights that belonged to the deceased.

## **2. Disposal of the Human Body, Organs and Tissue After Death**

As a subject of the law, a human being exists from the moment of his birth until his death (para. 2 of Art. 17 of the RF Civil Code). The moment of death is the moment when the brain dies or the moment of a person’s biological death (irreversible death) (para. 1 of Art. 66 of the Law on the Protection of the Health of Citizens).

When a person dies, he ceases to exist as an individual, his material shell cannot be considered to be an integral part of the subject. Therefore, the very possibility of discussing a person’s proprietary right to his body disappears. The right of other persons to the body as a material object can be discussed, because the main argument that one person cannot have rights to (own) another person does not work in this situation.

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<sup>56</sup> Приказ Минздрава России от 30 августа 2012 г. № 107н «О порядке использования вспомогательных репродуктивных технологий, противопоказаниях и ограничениях к их применению» // СПС «КонсультантПлюс» [Order of the Ministry of Healthcare of the Russian Federation No. 107n of 30 August 2012. On the Order of the Use of Auxiliary Reproductive Technologies, Counterindications and Limitations of their Use, SPS “ConsultantPlus”] (Aug. 24, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_142595/](http://www.consultant.ru/document/cons_doc_LAW_142595/).

The most popular position is the one where the corpse of a human being is considered an object (item), but an item that is undoubtedly limited in turnover.<sup>57</sup> However, it is not possible to agree with such a categorical approach.

Unlike separated organs and tissue that, thanks to the efforts of modern science, have gained the status of objects that are highly in demand and useful, a human corpse as a whole cannot be seen as an independent object of proprietary relationships. In relation to the legal status of corpses, the Anglo-American law applies the principle of “no property rights in the human body.”<sup>58</sup>

Some Russian jurists propose to consider corpses to be “other property”: for example, a “biological object” or “human biological material.”

Thus, according to Apolinskaya, in terms of civil law a human corpse may be recognized as a bio-object that has specific features explained by its origin, the moment of appearance in turnover (coincides with the pronouncement of the subject’s death) and the specific characteristics of the rights that exist in relation to it. As noted above, this author proposes to consider the rights to such objects to be a special type of ‘bio rights’ that have a proprietary legal nature.<sup>59</sup>

What specific problems are solved with the introduction of such a special object and why classical constructs (in particular the construct of an item limited in turnover) cannot be used in this case is unclear.

Several Russian specialists believe that the body remains a non-property benefit even after death and, accordingly, cannot be viewed as a thing (item) or be an object of ownership rights.<sup>60</sup>

It is true that if a living body is protected as a non-property benefit (right to inviolability, dignity), then such protection should remain after the death of the person.

This was the reasoning of the Constitutional Court of the Russian Federation which found that the right to the protection of an individual’s dignity and personal inviolability excludes unlawful influence of a person both in physical and in psychological terms, and the term “physical inviolability” covers not just the period when a person is alive, but also serves as a necessary prerequisite to create legal guarantees for the protection of the body of a deceased person.<sup>61</sup> Earlier, the Supreme

<sup>57</sup> Safonova & Karpova 2012.

<sup>58</sup> *Exelby v. Handyside* (1749) 2 East P.C. 652, 653; *R v. Kelle* (1999) Q.B. 621, 630–631.

<sup>59</sup> Apolinskaya 2009.

<sup>60</sup> See Krasnovsky 1993; Volozh 1928, at 216.

<sup>61</sup> Определение Конституционного Суда Российской Федерации от 4 декабря 2003 г. № 459-О «Об отказе в принятии к рассмотрению запроса Саратовского областного суда о проверке конституционности статьи 8 Закона Российской Федерации «О трансплантации органов и (или) тканей человека» // Законы, кодексы и нормативно-правовые акты Российской Федерации [Determination of the Constitutional Court of the Russian Federation No. 459-O of 4 December 2003. On Denial of the Request of the Saratov Regional Court to Examine the Constitutional Compliance of Article 8 of the Law of the Russian Federation “On Transplantation of Human Organs and/or Tissue,”

Court of the Russian Federation recognized that personal non-property relationships do not cease to exist at the moment of a citizen's death, and that the dignity of an individual includes respectful treatment not only of the deceased himself, but also of his remains.<sup>62</sup>

The legal guarantees for the rights of the deceased are provided not only by civil law, but also by other branches of the law as well.<sup>63</sup>

Russian legal norms provide extensive material for the analysis of the approaches to determining the status of the human body after death. The determinations of the nature of the rights to a body after death, as a rule, reference the provisions of the Federal Law of 12 January 1996 No. 8-FZ "On Burial and the Funeral Business"<sup>64</sup> that establishes the order of the activities to bury a person's body (remains) after death in compliance with the customs and traditions that do not contradict the norms of what is considered sanitary and other requirements. In particular, this Law provides for guarantees for the burial of the deceased in compliance with his living will and the wishes of his relatives (Art. 1 of the Law).

The Law determines the will of the person in relation to a dignified treatment of his body after death as a wish expressed orally in the presence of witnesses or in writing. The Law has no special requirements as to the written form of the wish. According to paragraph 1 of Article 5 of the Law, this wish can concern: the person's consent or non-consent to having an autopsy performed; choice of a burial ground, including burial close to earlier deceased persons, customs or traditions of the burial; possibility of cremation; consent or non-consent to having organs and/or tissue harvested from the body; appointment of an executor.

In the absence of a will, the spouse, close relatives (children, parents, adopted children, adoptive parents, brothers and sisters, grandparents) and other relatives or a legal representative of the deceased have the right to consent to the actions mentioned above. In the absence of these persons, other persons who undertake the obligation to bury the deceased (para. 3 of Art. 8 of the Law) have these rights.

This expression of the will as set out in the Law is an act of disposal of personal non-property rights in the event of death that cannot give rise to any property rights in most cases. As a rule, a body must be buried in a decent manner and cannot be

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Laws, Codes and Regulations of the Russian Federation] (Aug. 24, 2020), available at <https://legalacts.ru/doc/opredelenie-konstitutsionnogo-suda-rf-ot-04122003-n-459-o-ob/>.

<sup>62</sup> See Safonova & Karpova 2012, at 54.

<sup>63</sup> Thus, liability for brutalization of human corpses is set out in Article 244 of the Criminal Code of the Russian Federation; the Federal Law of 12 January 1996 No. 8-FZ "On Burial and the Funeral Business" requires that a human corpse be treated with dignity.

<sup>64</sup> Федеральный закон от 12 января 1996 г. № 8-ФЗ «О погребении и похоронном деле» // СПС «КонсультантПлюс» [Federal Law No. 8-FZ of 12 January 1996. On Burial and the Funeral Business, SPS "ConsultantPlus"] (Aug. 24, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_8919/](http://www.consultant.ru/document/cons_doc_LAW_8919/).



the object of appropriation, not to mention turnover. The affirmation of a body's material nature, in our opinion, is not sufficient grounds for its recognition as an object of property rights, including the right of ownership.

Practically all the possibilities envisioned by the Law in relation to the status of the body after death are not related to any purposeful use of the body, do not have any economic content, and merely reflect the will of the person aimed at protecting the physical inviolability of his body after death. This is confirmed by the very name of the discussed article which points to the purpose of the regulation – ensuring respectful treatment of a body after death. When Maleina characterizes the act of giving instructions as to the place of burial, she notes that the object of the legal relationships in this case is physical inviolability.<sup>65</sup> From our point of view, we can also speak of the realization of the benefit of personal dignity.

For the same reason, the Law makes no connection between the group of persons who can determine the procedure of burial and physical intervention in the body in the absence of a will of the deceased to their rights to inherited property (relatives, legal representatives, persons who undertake the obligation of burial).

There is a point of view that in the living will described in Article 5 of the Law on Burial the person determines the possibility of the use of his organs and tissue, including transplantation purposes. In this case, other usable objects appear, so such instructions can be considered to have a proprietary nature. Thus, analyzing the right to permit the extraction of organs set out in Article 5 of the Federal Law "On Burial and the Funeral Business," Zelentsov and Baich insist that,

This right is none other than a proprietary power to dispose (control) of a special kind of possession. The grounds for the appearance of these powers are not determined in the law.<sup>66</sup>

In our opinion, this point of view is based on an incorrect determination of the goals and purposes of the discussed Law – its norms do not regulate matters of the practical use of a body or parts thereof. The provisions of this Law help to express a living will in relation to organs and body parts, for example separation of certain organs for further burial. There are many examples of such situations in history.

Thus, dying from tuberculosis, the composer Frederic Chopin gave instructions that he be buried in Paris but that his heart should be returned to his homeland – Poland. The will of the deceased was fulfilled. The Soviet poet A. Lugovskoy liked to vacation in Yalta, which was home to a picturesque cliff where the poet enjoyed spending time. In his will, he included instructions to have his heart buried in that cliff: the body of the

<sup>65</sup> Maleina 2003.

<sup>66</sup> Зеленцов А.Б., Бабич Д.В. Особенности ответственности за нарушения законодательства о трансплантации на Украине // Административное и муниципальное право. 2012. № 3. С. 73–76 [Alexander B. Zelentsov & Dmitry V. Babich, *Specific Characteristics of Liability for Violations of the Laws on Transplantation in the Ukraine*, 3 Administrative and Municipal Law 73 (2012)].

poet was interred in a Moscow cemetery, but his heart in Yalta, in a niche in the cliff.<sup>67</sup> The body of poet Eduard Asadov was interred in Kushtsevskoye cemetery in Odintsovo, but in accordance with his will his heart was buried on the Sapun-Mountain in Sevastopol where during the war in 1944 he had been wounded and lost his sight.<sup>68</sup>

These instructions concerning the integrity of a body must be considered to be non-property last will instructions that do not result in the appearance of new objects of property rights.

Other laws also mention instructions that determine the place of burial. Thus, in accordance with Article 22 of the Federal Law "On Foreign Intelligence,"<sup>69</sup> military personnel may specify a place of burial in their wills. If an active employee of the Russian foreign intelligence service or a member of his family dies in connection with their intelligence duties, the relevant government executive body is obliged to cover the expenses for preparation and transportation of his remains to the location specified in the will.

Despite the fact that literary texts and sometimes even the text of the law call the instructions in relation to a deceased's body "will," from a legal point of view such instructions do not constitute wills. Based on the definition of the law (Art. 1119 of the RF Civil Code), a will is understood as a legal act aimed at determining the status of property after death. The human body and organs cannot be included in the estate, because at the time of death these objects are not property.<sup>70</sup>

The living instructions as to the disposal of the body that determine the order of burial mentioned in Article 5 of the Law on the funeral business differ from a last will and testament both in terms of content and in terms of form. Such instructions of a non-property nature (despite the fact that they were only recently set out in civil law) are well known to the Russian legal system. For example, the determination of the burial site was cited as an example of a non-property type of instruction by Serebrovsky.<sup>71</sup>

<sup>67</sup> Добровольский А. Необычное завещание Хворостовского: кого еще похоронили в двух могилах // Московский комсомолец. 22 ноября 2017 г. [Alexander Dobrovolsky, *Khvorostovsky's Unusual Will: Who Else Was Buried in Two Tombs*, Moskovsky Komsomolets, 22 November 2017] (Aug. 24, 2020), available at <https://www.mk.ru/social/2017/11/22/neobychnoe-zaveshhanie-khvorostovskogo-kogo-eshe-pokhoronili-v-dvukh-mogilakh.html>.

<sup>68</sup> Войцеховский Б. Сердце Асадова захоронят на севастопольской Сапун-горе // Комсомольская правда. 23 апреля 2004 г. [Boris Voitsekhovsky, *Asadov's Heart to Be Buried on Sevastopol's Sapun-Mountain*, Komsomolskaya Pravda, 23 April 2004] (Aug. 24, 2020), available at <https://www.kp.ru/daily/23264/28374/>.

<sup>69</sup> Федеральный закон от 10 января 1996 г. № 5-ФЗ «О внешней разведке» // СПС «КонсультантПлюс» [Federal Law No. 5-FZ of 10 January 1996. On Foreign Intelligence, SPS "ConsultantPlus"] (Aug. 24, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_8842/](http://www.consultant.ru/document/cons_doc_LAW_8842/).

<sup>70</sup> Ковалев М.И. Юридические проблемы современной генетики // Государство и право. 1995. № 6. С. 15–21 [Mitrofan I. Kovalev, *The Legal Problems of Modern Genetics*, 6 State and Law 15 (1995)].

<sup>71</sup> Серебровский В.И. Избранные труды по наследственному и страховому праву [Vladimir I. Serebrovsky, *Selected Works on Inheritance and Insurance Law*] 558 (2<sup>nd</sup> ed., Moscow: Statut, 2003).

According to the most recent edition of paragraph 1 of Article 1139 of the RF Civil Code, an estate-leaver may, provided that a certain portion of the property is allocated for these purposes, oblige his heirs as well as the executor of his estate to perform non-property actions that may include the actions related to the burial process.<sup>72</sup> Testamentary instructions related to the procedure of the burial of the body (parts thereof) may be included in the text of the last will or prepared in compliance with the requirements of the Law on the burial business.

In certain situations, the instructions for the disposal of a body in the event of death may have a special nature. Thus, in 1927 the father and son Kotelnikov bequeathed their bodies to Pavlov Medical University for scientific research and educational purposes: still today, the skeleton of Kotelnikov-son is used by students to study human bones, while the remains of his father are used for the study of muscles, blood vessels and nerves. Their family does not object to such use of the remains of their deceased relatives.<sup>73</sup> One of the exhibits at the museum of the Irkutsk State Medical University (ISMU) is the body of a pathologist who caught an incurable disease while autopsying bodies in 1925 and bequeathed his body to the university, thus perpetuating his memory and legacy. Every year, his relatives contact the museum and inquire as to the condition of their ancestor's skeleton.<sup>74</sup>

In such cases, obviously, an interesting situation occurs – the body or parts thereof are not buried after death, but continue to exist in a different status, as items used for scientific and educational purposes. It is obvious that the right of ownership applies to such objects even though they are very limited in turnover.

Our opinion is that, in the situations discussed above, the existence of two circumstances is required in order for museums to have the right of ownership: (1) the fact of death which scholars call the moment of “reification” of the body and (2) the existence of an expression of the will of the subject (that does not contradict the law) who gave up the possibility of burial and determined a different future for his body. In essence, the object of the right of ownership will not be the dead body in its natural condition, but an object that appeared as a result of labor – efforts to preserve, process and store it (etc.). The right of ownership to the indicated object must be considered to have occurred in relation to the person who was named in the living will of the subject or with consideration of such will (for example, when a potential beneficiary is not directly identified, but only the purpose of use is named) – the persons who execute the will of the deceased. The persons authorized

<sup>72</sup> A detailed comparison of the provisions of the RF Civil Code and the Law on Burial in terms of the form of the relevant instructions, compensation of expenses, etc. is not the purpose of this article.

<sup>73</sup> Андреев С. Настоящим завещаю свое тело студентам // Смена [Sergey Andreev, *I Hereby Bequeath My Body to Students, Smena*] (Aug. 24, 2020), available at <http://www.smena.ru/news/2007/02/19/10207>.

<sup>74</sup> Корк А. Завещать себя музею // СМ Номер один. 21 февраля 2013 г. [Alena Kork, *To Bequeath Oneself to a Museum, SM Nomer odin*, 21 February 2013] (Aug. 24, 2020), available at <http://baik-info.ru/sm/2013/07/004005.html>.

to protect the non-property benefits in the interest of the deceased have the right to control the actions of the owner.

The more complicated issue is the existence of the rights of ownership to objects obtained as a result of the use of an unclaimed body. Currently, the order of the use of such objects is determined by the "Rules of Transfer of Unclaimed Human Bodies, Organs and Tissue for Use for Medical, Scientific and Educational Purposes and on the Use of Unclaimed Human Bodies, Organs and Tissue for the Indicated Purposes."<sup>75</sup> The Rules do not regulate the relationships related to the donation of human organs and tissue or their transplantation. The transfer of the body and organs for the purposes described in the Rules is possible only in situations where the identity of the deceased is confirmed.

According to the Rules, the unclaimed body, organs and tissue of a deceased person may be transferred to certain educational, scientific and medical institutions for use for the above purposes in compliance with paragraph 1 of Article 12 of the Law on Burial. The following conditions must be met: a relevant request of the receiving organization; the existence of permission to transfer an unclaimed body, organs and tissue issued by a person or an authorized body that arranged for forensic tests to be performed. The transfer is formalized in a special act. The rule prescribed by paragraph 8 of the Rules is notable: the receiving organization must use the unclaimed body, organs and tissue of a deceased person in compliance with medical ethics, rules of dignified treatment of a human body after death, and sanitary norms and rules of hygiene.

These provisions make it possible to reach the conclusion that in the stated situations an unclaimed body is considered to be an object that has a particular practical purpose. In this view, the body can be classified as an item limited in turnover. The receiving organization will have the right of ownership to the objects transferred to it and the order of their use must comply with the purposes for which the object was received. The disposal of such objects is limited. In essence, in this situation, the determination of the destination of an unclaimed body is made by authorized organizations due to the fact that it is impossible to determine the wishes of the deceased or his relatives. Nevertheless, the use of the body must comply with ethical norms and the requirements as to the protection of the dignity of the deceased.

The existence of the Rules makes it possible to assume that the use of unclaimed bodies for other purposes not envisioned in the Rules – for example, for the purpose of creating an art object – is not permitted.

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<sup>75</sup> Постановление Правительства Российской Федерации от 21 июля 2012 г. № 750 «Об утверждении Правил передачи невостробованного тела, органов и тканей умершего человека для использования в медицинских, научных и учебных целях, а также использования невостробованного тела, органов и тканей умершего человека в указанных целях» // СПС «Консультант-Плюс» [Decree of the Government of the Russian Federation No. 750 of 21 July 2012. On the Approval of the Rules of Transfer of Unclaimed Human Bodies, Organs and Tissue for Use for Medical, Scientific and Educational Purposes and on the Use of Unclaimed Human Bodies, Organs and Tissue for the Indicated Purposes, SPS "ConsultantPlus"] (Aug. 24, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_133200/](http://www.consultant.ru/document/cons_doc_LAW_133200/).

The cases of preservation of bodies using cryonics (freezing) require a separate discussion.<sup>76</sup> Thus, Professor James Belford became the first volunteer to agree to have his body frozen using cryonics. His body was frozen in 1967 several hours after his physical death with the intention of reviving it in the future when medicine discovers a cure for cancer. In 1991, the body was moved to a new cryostat. Tests showed that the condition of the body had not changed and there were no signs of deterioration.<sup>77</sup> In terms of Russian law, such arrangements should be categorized as testamentary instructions of non-property nature that concern the body after death. The matter of the subject of the rights to a cryonically frozen body should be settled with consideration of the wishes of the deceased or, in the absence thereof, with the wishes of the persons who are authorized to determine the procedure of burial (spouses, close relatives).

The use of a body after death must not violate the moral norms of the society. After death, the non-property benefits of a human being – including the right to physical inviolability and dignity – continue to be protected, which provides the parties concerned with an opportunity to demand the enforcement of the relevant legal measures in case of any violations of the specified rights. Safonova and Karpova correctly note that, in accordance with the law and precedent, the body (ashes) of a deceased person is considered to be an object of the right to the protection of physical inviolability, but erroneously state that this right is inherited by their legal successors.<sup>78</sup> The persons who can protect the personal non-property benefits after the death of their owner are not legal successors of such a person, because the indicated benefits are not transferred to them because of their personal nature.

The act of issuance of living instructions for the disposal of a body that does not concern the procedure of burial, but the preservation of the remains as a scientific, religious or artistic object, despite the appearance of proprietary consequences, is not a last will and testament, but may be qualified as a testamentary assignment (para. 1 of Art. 1139 of the RF Civil Code).

It is notable that the problem of the determination of the legal status of a human body after death became relevant fairly recently mostly because of the successful development of transplantology. The first transplantations of organs harvested from

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<sup>76</sup> The use of cryogenics is thoroughly discussed in the works of L. Kulitskaya: Кулицкая Л.И. Крионика – как альтернативная форма погребения: правовой аспект // Проблемы экономики и юридической практики. 2016. № 1. С. 112–115 [Lydia I. Kulitskaya, *Cryonics as an Alternative for Burial: The Legal Aspect*, 1 Problems of Economics and Legal Practice 112 (2016)]; Kulitskaya, *The Legal Status of Human Organs*, *supra* note 36.

<sup>77</sup> Крионирование человека. Ученые пытаются оживить «замороженных» людей. Замораживание людей для продления жизни // Мировое обозрение. 17 июня 2019 г. [Human Cryofreezing. Scientists Attempt to Revive Frozen People. Freezing for Extension of Life, World View, 17 June 2019] (Aug. 24, 2020), available at <https://tehnowar.ru/107803-krionirovanie-cheloveka-uchenye-pytajutsja-ozhivit-zamorozhennyh-ljudej-zamorazhivanie-ljudej-dlja-prodlenija-zhizni.html>.

<sup>78</sup> See Safonova & Karpova 2012, at 54.

the deceased (predominantly kidneys) were performed in the 1960s. In 1963, the first lung transplant was performed, in 1967, heart and liver transplants were successfully pioneered. So it is not surprising that the main discussion revolves around the status of organs and tissue that may be used for transplantation purposes. It must be noted that the legal constructs justifying the approach to the human body after death as to an object of proprietary rights was discussed by various authors only in conjunction with the possibility of extracting organs and tissue for transplantation. In the past few years, the discussion of this problem has extended to the determination of the status of other biomaterials obtained after the death of a human being.

As pointed out, in order for the organs and tissue separated from a living body to be recognized as things (items, possession) and, therefore, objects of ownership rights, it is insufficient to simply separate them from a body, but the will of the donor himself, an expression of the donor's consent to their use (for example, for research) is required.

Can this conclusion be applied to organ and tissue extraction after death?

The current law regulates the procedure for obtaining consent for the extraction (harvesting) of organs for transplantation.

Thus, in accordance with paragraph 6 of Article 47 of the Law on the Protection of the Health of Citizens, a competent adult of full legal age can express his consent (non-consent) to the extraction of organs and tissue from his body for transplantation either orally in the presence of witnesses or in writing that has to be certified by the head of the relevant medical organization or a notary in accordance with the procedure prescribed by the Law.

In the absence of the expressed wishes of a competent adult (now deceased) of full legal age, the right to express consent (non-consent) to the extraction of organs and tissue from the body of the deceased for transplantation purposes belongs to the spouse, and in the absence thereof to one of his close relatives (children, parents, adoptive parents, brothers and sisters, grandchildren, grandparents) (para. 7 of Art. 47 of the Law). In the event of the death of an under-aged person, or of a person deemed legally incapacitated, the extraction of organs and tissue from his body for transplantation purposes is permitted with the consent of one of his parents.

If, at the moment of organ or tissue harvesting, the medical organization is notified of the fact that the person (while alive) or other persons identified above expressed an objection (gave no consent) to the extraction of organs or tissue for transplantation, no harvesting is permitted.

The expression of a person's will to have his organs or tissue transplanted after his death (Art. 47 of the Law on the Protection of Health) may be categorized as a special type of testamentary arrangement that is not related to the organization of burial. Such declarations of will may be prepared separately outside the text of the last will and testament, which is more reasonable in the practical sense, because the secrecy of the last will and the period of its disclosure may not serve the organs

and tissue well – it may be too late to use them after the will is read. The extraction of the organs and tissue must be performed immediately after death.<sup>79</sup>

Such expression of wishes (consent to postmortem donation) should be distinguished from the instructions discussed earlier in relation to which Article 5 of the Law on Burial also permits organ extraction, but not for the purposes of independent burial. In our opinion, Article 47 of the Law on the Protection of the Health of Citizens has a different area of application and directly regulates the relationships connected with the transfer of human organs after death for transplantation.

The division of the areas of regulation makes it possible to avoid complaints about the contradictions between the specified norms that some researchers<sup>80</sup> have made about the fact that the Law on Burial requires direct expression of the will, while the Law on the Protection of Health and the Law on Transplantation of Organs and Tissue implement the model of “presumed consent.”

The Law on Transplantation of Organs and Tissue (Art. 8) states that no organ or tissue can be harvested from a corpse if at the moment of harvesting the medical institution is notified of the fact that the person (while alive) or his close relatives (legal representative) did not consent to the harvesting of organs and/or tissue after death for the purpose of transplantation.

In its Determination of 4 December 2003 No. 459-O “On Denial of the Request of the Saratov Regional Court to Examine the Constitutional Compliance of Article 8 of the Law of the Russian Federation ‘On Transplantation of Human Organs and/or Tissue,’”<sup>81</sup> the Constitutional Court of the Russian Federation found that this Article of the Law on Transplantation provides for a presumption of consent to organ and/or tissue extraction after death (“unsolicited consent” or “presumed consent”) and confirmed that this norm is constitutional.

Apart from Russia, the model of “presumed consent” is used in Italy, Austria, the Czech Republic, Belgium, Spain, France, Finland, Norway and Poland, and in other countries as well. Another model – the model of “solicited consent” – is used in, for example, the USA, Sweden, Portugal, Denmark, Germany, Australia, and Canada.<sup>82</sup>

The importance of the protection of personal non-property benefits of a human being and the need to respect his priority right to dispose of his own body, even after death, is one of the main arguments in support of the requirement for directly

<sup>79</sup> *Матвеева М.В.* Последняя воля о порядке погребения // *Наследственное право*. 2018. № 3. С. 23–26 [Maria V. Matveeva, *The Last Will on the Order of Burial*, 3 *Inheritance Law* 23 (2018)].

<sup>80</sup> Evseev 2010.

<sup>81</sup> Determination of the Constitutional Court of the Russian Federation No. 459-O of 4 December 2003, *supra* note 61.

<sup>82</sup> *See Сергеев Ю.Д., Поспелова С.И.* Правовые аспекты посмертного донорства: современное состояние и проблемы регулирования // *Медицинское право*. 2006. № 2. С. 3–10 [Yuri D. Sergeev & Svetlana I. Pospelova, *The Legal Aspects of Post-Mortem Donorship: Current Condition and Problems of Regulation*, 2 *Medical Law* 3 (2006)].



expressed consent to postmortem donation. The model of “presumed consent” is based on the presumption that human beings are altruistic by nature and the intention to save another person’s life should prevail over personal interests, especially in the event of death, when physical inviolability does not have the same importance. In addition, when choosing the model of “presumed consent” the legislator considers the need to maintain a healthy balance between personal interests and the interests of the society as a whole, which is interested in the possibility of restoring the health of many people who can be saved with the help of timely transplantation.

Studies show that more than 40% of our compatriots say that they would be willing to donate their organs after death (43%). However, if the respondents are asked to formalize their consent in an official document, only 22% of Russians are ready to become postmortem donors. Overall, every third citizen of our country (37%) is willing to officially register their wishes as required by law.

The average European statistics show that a little more than half of the population is willing to consider the donation of their organs after death (55%). In Russia, this indicator is below the average European level – 46%, which is 1.5 to 2 times lower than in such countries as Sweden, Denmark, France and the Netherlands.

At the same time, the willingness of Russians to donate their organs to their close relatives (spouses, children) is much greater.<sup>83</sup>

The data show that if the model of directly expressed consent is adopted, transplantation medicine may face serious problems that arise not from the concerns of the Russian public with the future of their body after death, but with the people’s unwillingness to formalize their wishes in official documents.

The advantages and drawbacks of these legal models are discussed not just by lawyers – the general public is also concerned with this issue, especially after the publication of the draft of the Federal Law “On Donorship of Human Organs and Their Transplantation” prepared by the Ministry of Healthcare of the Russian Federation.

This draft does not change the existing model of regulation, but clarifies several provisions related to the expression of the will of a legally capable adult of full legal age as to his non-consent to the donation of his organs and tissue after death for the purposes of transplantation (Art. 14 of the draft), and to the consideration of the opinion of his spouse and/or close relatives in the absence of such person’s expressed wishes (Art. 15 of the draft).

In particular, according to the draft, in the situation of the death of a citizen recognized as an acceptable donor who did not, while alive, consent to the harvesting of his organs after death for the purposes of transplantation, an authorized medical employee, within one hour of the moment of signature of the death certificate (certificate of brain death),

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<sup>83</sup> Караева О.С. Между даром и товаром: проблематика развития донорства органов в общественном мнении россиян // Вестник общественного мнения. 2013. № 2(115). С. 56–66 [Olga S. Karaeva, *Between a Gift and a Commodity: The Problems of the Development of Organ Donorship in Russian Public Opinion*, 2(115) Public Opinion Herald 56 (2013)].

must orally, in person or by telephone (provided that the telephone conversation is recorded), notify his spouse, and in the absence of a spouse, one of his close relatives (children, parents, adopted children, adoptive parents, brothers, sisters, grandchildren or grandparents), who visit the patient or are staying with him in the medical institution, or who are identified in the medical chart of the deceased or in other documents that are on his person at the moment of his death.

Such persons can (within three hours from the moment they were notified of the death) declare the deceased's non-consent to the harvesting of his organs for transplantation in writing. In the absence of information on the expressed wishes of the deceased (his non-consent), these persons have the right to state their own non-consent in writing.

These provisions caused an uproar, because many people believe that it is unethical to ask close relatives to make a decision about organ donation practically at the moment of their loved one's death.

Nevertheless, these provisions of the draft law may be considered to be evidence of the legislator's intention to ensure that the wishes of the deceased are identified, and for this reason the procedure of establishment of the will of the deceased is described. Due to objective reasons, if the model of "presumed consent" is used, it will be impossible to design a procedure that would guarantee full certainty in the content of such wishes.

To return to the possibility of recognizing organs and tissue separated from the body after death as items (possessions) and determining the will of their owner, we must note that if an expressed living consent to the harvesting of organs for transplantation is available, the problems of the existence of the right of ownership to the organs and tissue that will be extracted should be dealt with in the same manner as the intention to donate a body (organs) to science or for use for other purposes (not for burial).

It appears that in the absence of direct expression of the will, the use of the construct of presumed consent provides grounds for the existence of proprietary rights to the transplanted organs.

When determining the default owner of the harvested organs and tissue we should be mindful of the fact that in the case of a living donation it is generally recognized that the right of ownership belongs to the donor. However, this approach is impossible in relation to a deceased person.

According to Fedorova,

In the context of market relationships, the organs and tissue intended for transplantation have the legal status of items limited in turnover. The right of ownership to such items belongs to the citizen from whom they were extracted, or to his heirs.<sup>84</sup>

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<sup>84</sup> Fedorova 2017, at 64.

However, the organs and tissue harvested from the body after death are not part of the estate, because they were not property at the moment of death,<sup>85</sup> and, therefore, there is no explicit reason to recognize the heirs as subjects of the right of ownership.

Organs and tissue become independent material objects at the moment they are separated from a body after death. It seems that the right of ownership to such objects appears in relation to the heirs, not in the context of legal succession (inheritance), but rather as an independent proprietary right. In this situation, there is no legal succession, but, conversely, special grounds for the appearance of the right of ownership. A special decision as to who the owner will be may be given in the relevant testamentary instructions. In terms of the implementation of the rights of ownership to extracted organs, the relationships are not very different from the situation where the organs and tissue are harvested from a living donor.

Accordingly, in order for the right of ownership to appear in relation to organs and tissue extracted from a dead body, it is insufficient to simply recognize the fact of death and the fact of separation of the organs from the body – as a general rule, direct or presumed consent of the subject is required to use his body, organs and tissue for specific purposes after his death.

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<sup>85</sup> Kovalev 1995.